In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

Filed: February 5, 2020

BRYAN ARMBRUSTER,	*	No. 17-1856V
Petitioner,	*	Special Master Sanders
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Motion to Dismiss; Influenza ("flu") Vaccine; SIRVA; Six-Month Requirement
Respondent.	*	

Michael G. McLaren, Black McLaren, et al., PC, Memphis, TN, for Petitioner
Lynn C. Schlie, United States Department of Justice, Washington, D.C., for Respondent

DECISION[1]

On November 30, 2017, Bryan Armbruster ("Petitioner") filed a petition pursuant to the National Vaccine Injury Compensation Program ("Program" or "Vaccine Program").[2] Petitioner alleges that he received an influenza ("flu") vaccine in his left deltoid on December 5, 2014, which resulted in a shoulder injury related to vaccine administration ("SIRVA"). Pet. at 1, ECF No. 1.

Respondent filed a motion to dismiss Petitioner's claim on June 28, 2019. Resp't's Mot. to Dismiss, ECF No. 36. Petitioner filed a response on July 8, 2019. Pet'r's Resp., ECF No. 37. Respondent filed a reply on July 15, 2019. Resp't's Reply, ECF No. 38. This matter is now ripe for consideration. For the reasons stated below, I **GRANT** Respondent's motion.

I. Procedural History

Petitioner filed his petition on November 20, 2017. Pet. at 1. On December 4, 2017, Petitioner filed three exhibits consisting of an affidavit, email correspondence, and medical records, and his first statement of completion. Pet'r's Exs. 1–4, ECF Nos. 6-1–6-4; ECF No. 7.

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[1] This decision shall be posted on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services). **This means the Decision will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to redact medical or other information that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, such material will be withheld from public access.

[2] National Childhood Vaccine Injury Act of 1986, Pub.L. No. 99–660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2012).

In response to a request from Respondent on January 26, 2018, Petitioner submitted additional medical records and an affidavit from Tim Goetz, Petitioner's personal trainer. Scheduling Order, ECF No. 9; Pet'r's Ex. 5, ECF No. 10. The following day, Petitioner filed a statement of completion along with a status report which stated that "Petitioner was not seen by any providers that he has information for other than those records already on file." ECF Nos. 11–12.

Respondent then filed his Rule 4(c) report on September 28, 2018. Resp't's Report, ECF No. 22. In his report, Respondent stated that the six-month requirement had not been met in this case, because the medical records indicate Petitioner suffered a shoulder strain two months post-vaccination, but no further treatment to Petitioner's left shoulder is documented until approximately two years later. [3] *Id.* at 7–8. On October 5, 2018, Petitioner was ordered to submit additional medical records and social media postings. ECF No. 23.

On November 19, 2018, Petitioner filed an exhibit consisting of a screenshot of his Facebook profile wall. Pet'r's Ex. 6, ECF No. 24. On April 11, 2019, I held a status conference with the parties. Min. Entry, docketed Apr. 11, 2019. During the status conference, Respondent reiterated that the record lacked evidence to support the six-month requirement for Petitioner's SIRVA claim. ECF No. 30 at 1. In response, Petitioner requested additional time to submit evidence that supported a six-month injury duration. *Id.* Respondent did not object, and I set a deadline of April 26, 2019, for Petitioner to submit the evidence. *Id.*

On April 23, 2019, Petitioner submitted an additional exhibit consisting of several photographs. Pet'r's Ex. 7, ECF No. 31-1. Petitioner labeled this exhibit as "Proof of medications and exercise equipment related to ongoing symptoms." *Id.* Three days later, Petitioner submitted a status report clarifying that the photographs in Exhibit 7 evidenced Petitioner's self-treatment to his ongoing SIRVA injury symptoms. ECF No. 32.

Petitioner filed a second affidavit on April 29, 2019. Pet'r's Second Aff., ECF No. 34-1. In response to Petitioner's filings, Respondent filed a status report indicating that he intended to move for dismissal on the basis that Petitioner cannot meet the six-month requirement. ECF No. 35 at 1. Respondent filed a motion to dismiss Petitioner's claim on June 28, 2019. Resp't's Mot. to Dismiss, ECF No. 36. Petitioner filed a response on July 8, 2019. Pet'r's Resp., ECF No. 37. Respondent filed a reply on July 15, 2019. Resp't's Reply, ECF No. 55. No other submissions have been filed.

II. Evidence

A. Medical Records

1. Kaiser Permanente Record

[3] Additionally, Respondent argued that "Petitioner's contemporaneous medical records failed to demonstrate that the onset of his alleged shoulder pain was within [forty-eight] hours of his flu vaccination." *Id.* at 6. This argument is made to discount Petitioner's claim of a Table Injury; however, it is not determinative for the issue decided here.

On December 5, 2014, at 9:50 AM EST, Petitioner presented to Kaiser Permanente for a health assessment. Pet'r's Ex. 3. He was seen by his primary care provider, Dr. Yu Sung Kim and Jamie Alejandro, M.A. *Id.* at 14. This visit was uneventful and Petitioner mentioned that he was training for a marathon later that month. *Id.* at 16. That same day, Petitioner received the flu vaccine at issue at 11:30 AM EST. *Id.* at 13. The medical records do not report any adverse event from the vaccination. *See id.* Later that afternoon, at 3:48 PM EST, Petitioner presented to Marites F. Notorio, C.A., with complaints of sharp knee pain. *Id.* at 25. Petitioner reported that the knee pain started around November 22, 2014, due to his marathon training. *Id.* at 26. Petitioner did not mention any shoulder concerns during his visit with Ms. Notorio.

On February 3, 2015, Petitioner presented to Dr. Spencer Tseng with complaints of left shoulder pain. *Id.* at 31. Dr. Tseng wrote that "[Petitioner] believes [he] developed pain after a flu shot." *Id.* at 32. Dr. Tseng wrote that Petitioner "states [the injection was] higher on his deltoid[, and there is] aching on the region." *Id.* Dr. Tseng also recorded that "[the pain is] localized without radiation [but] no weakness[;] [it is] bothersome on certain movement[s,] mostly overhead activities." *Id.* Petitioner also had "complain[t]s of some elbow pain on the left when he tries to touch [his] back overhead." *Id.* Left shoulder x-rays were ordered at this visit. *Id.* at 34. On February 10, 2014, the x-ray results showed that there was "no acute fracture or dislocation in the left shoulder." *Id.* at 51. Additionally, the x-ray showed that "[the] joint spaces appear intact. There is no evidence of a radiopaque foreign body." *Id.* Petitioner was referred for physical therapy. *Id.* at 53.

2. Email exchange between Petitioner and Yu Kim MD

Petitioner communicated by email with Dr. Kim between December 29, 2014, and January 13, 2015, about a potential SIRVA diagnosis. Pet'r's Ex. 2 at 1–4. On December 29, 2014, Petitioner wrote that he was "still feeling intense discomfort where [he] received the [flu vaccine,]" and that "[his] symptoms are consistent with what [he has] read . . . about SIRVA." *Id.* at 4. Dr. Kim replied on December 31, 2014, and wrote that "[she was] not sure what SIRVA is." *Id.* at 3. She instructed Petitioner not to wait and go to an urgent care facility for his "intense" pain. *Id.*

Petitioner responded a week later, on January 7, 2015, and provided Dr. Kim with two weblinks, one of which was from the Program's website. *Id.* Additionally, Petitioner wrote that "[his] pain began a few hours after the injection and has persisted." *Id*. Petitioner explained that he has pain in "certain positions[,] and [his] range of motion is limited" since the injection. *Id.* He noted that he had never had issues in his shoulder before. *Id.* Petitioner then asked whether he should schedule a visit or get an X-ray or MRI first. *Id.*

On January 9, 2015, Dr. Kim replied with some exploratory questions about the look and feel of the injection site and explained that rare and unusual side effects may be possible after a shot. Pet'r's Ex. 2, at 2–3. Petitioner responded the next day. He wrote that the "injection site was in his left shoulder [and that it was] not swollen or discolored." *Id.* at 2. Petitioner continued, "[i]t is tender when pushed on [and] painful when [he] move[d] it 45 degrees or more out from [his] body." *Id.* However, Petitioner noted that "[the shoulder] is not painful at rest." *Id.* Petitioner cited changing his shirt and driving as examples of painful activities. *Id.* Petitioner proffered the theory that "the injection went into his bursae instead of the muscle." *Id.* He based

this theory on an opinion that an incorrectly administered injection would render a vaccine ineffective and the flu like symptoms he was experiencing at that time. *Id.* Petitioner wrote that he thought that the nurse, who was standing while he was seated, had administered the injection higher on the arm than a normal flu shot. *Id.*

In her reply, Dr. Kim wrote that she "did not think that the needle was long enough to reach the bursa and [that the nurse] would had to have pushed it a lot harder [to get through] the muscle." *Id.* Dr. Kim addressed the fact that the flu vaccine Petitioner received "only covered 40% of the strains" present in that flu season. *Id.* She concluded by referring Petitioner to a musculoskeletal specialist. *Id.* This is the last email filed in the exchange and is dated January 13, 2015.

3. CareMed Medical Record

On December 21, 2016, Petitioner presented to Joanna Bock, M.D., for an annual preventive exam. Pet'r's Ex. 4. Petitioner reported that his left shoulder was "the biggest problem." *Id.* at 1. Specifically, he told Dr. Bock that "he [had] no pain at rest. If he [did] anything more than the equivalent of 20 pushups[,] then he [had] pain and weakness in the shoulder." *Id.* Petitioner added that once the pain and weakness set in, "he [could not] pick [up] his arm over the level of the shoulder." *Id.* At this visit, Petitioner also requested a prescription for an Apple watch to track vital signs and fitness. *Id.*

B. Affidavits

1. Petitioner's First Affidavit

Petitioner's first affidavit was filed on December 4, 2017. Pet'r's Ex. 1. Petitioner attested that within forty-eight hours after receiving the December 5, 2014 vaccination, "[he] developed increasing soreness, stiffness, aches, pains, and reduced range of motion in [his] left shoulder[,] which were at or near the site of the injection." *Id.* at ¶2–3. He claimed that he did not have any acute distress or shoulder injuries prior to the vaccination. *Id.*

Petitioner recounted his email exchange with Dr. Kim and Dr. Tseng's diagnosis of a left shoulder strain. *Id.* at ¶4–6. Petitioner stated that "because [he] was in good overall shape and otherwise healthy, [he] chose not to incur the time and expense of going through physical therapy and decided to wait and see if [his] left shoulder would get better on its own." *Id.* at ¶7. Petitioner wrote that he presented to Dr. Johanna Bock on December 21, 2016, where he reported that his "left shoulder continued to nag him . . . if [he] did anything more than [twenty] pushups." *Id.* at ¶8. Petitioner stated that he was referred to an orthopedist but "chose to work exclusively with his personal trainer" rather than present to the medical specialist. *Id.* at ¶8–9.

Finally, Petitioner attested that his shoulder injury symptoms have never completely resolved, that he still experiences pain in his left shoulder, and that his shoulder disrupts his daily life. *Id.* at ¶10–12. Further, Petitioner stated that he has not received compensation for any vaccine-related injuries. *Id.* at ¶13.

2. Petitioner's Second Affidavit

Petitioner submitted a second affidavit on April 29, 2019, to support the photographs filed in Exhibit 7. Pet'r's Ex. 8. In his affidavit, Petitioner wrote that the he continued to train at home with the exercise band that is shown on the first page of Exhibit 7. *Id.* at ¶1. Petitioner stated that the exercise band is used "to workout, loosen, and treat his vaccine-injured shoulder." *Id.* at ¶2.

Petitioner wrote that pages four through seven of Exhibit 7 show "regular purchases made at local pharmacies and grocery stores for [over-the-counter ("OTC")] pain medication" that he has been taking "on a regular basis for ongoing shoulder pain." *Id.* at ¶4. Additionally, Petitioner attested that page ten of Exhibit 7 showed a "recent purchase receipt for pain medication for [his] shoulder." *Id.* at ¶5.

Petitioner stated that "[he] was not regularly using the exercise band or purchasing this level of OTC pain medication on a regular basis until after [his] shoulder injury," and "his symptoms have lasted longer than six months and continue to exist." *Id.* at ¶6–7.

3. Personal Trainer's Affidavit

In support of his claim, Petitioner submitted an affidavit by Tim Goetz, Petitioner's personal trainer, on February 5, 2018. Pet'r's Ex. 5. In the affidavit, Mr. Goetz attested that he completed the following certifications: "National Academy of Sports Medicine Certified Personal Trainer (CPT); [m]ental toughness; [e]xercises for [o]verhead throwing athletes; [s]ports [n]utrition; [l]ife [c]oaching; [c]ardio training for [p]erformance; [c]ardio training for [w]eight [l]oss; [i]ndoor [r]owing; and [r]esistance [f]unctional [t]raining." *Id.* at ¶2. Additionally, Mr. Goetz stated that he also has specializations in women's fitness, youth fitness, group training, and mixed martial arts. *Id.*

Mr. Goetz wrote that he met Petitioner at an Orange Theory fitness class in late December of 2016. *Id.* at ¶3. In an interaction between Petitioner and Mr. Goetz on December 22, 2016, "Petitioner explained that he had shoulder pain, soreness, and weakness in his left shoulder and asked whether [Mr. Goetz] could work in a personal training capacity to help [Petitioner] strengthen [his left shoulder]." *Id.* at ¶4. Petitioner told Mr. Goetz that he wanted to improve his pushup ability. *Id.* According to Mr. Goetz, Petitioner was on to a second stage of the FBI application process and "his shoulder pain reduced the likelihood that he could pass the FBI's [p]hysical [f]itness test." *Id.*

Mr. Goetz "put together a regiment of stretches and strengthening exercises and monitored Petitioner to help perfect the movements and to ensure proper form." *Id.* at ¶5–6. Mr. Goetz attested that "[o]ver . . . [ten] months, I have continued to work with [Petitioner] 1–2 times per week. The pain and weakness in his shoulder has not diminished. He is unable to perform more than [ten to fifteen] pushups without experiencing debilitating pain resulting in soreness that lasts [twenty-four to seventy-two] hours." *Id.* at ¶7. Mr. Goetz wrote that "[i]n [his] experience, the training/rehab regiment [he] designed should have improved Petitioner's strength/mobility and reduced pain[.]" *Id.* at 3. He based this opinion on his personal and professional experience. *Id.* Mr. Goetz wrote that "[d]espite [Petitioner's] hard work and how focused he has been on taking care of himself, there's been no discernable improvement." *Id.*

C. **Additional Filed Evidence**

Petitioner's Facebook wall included images, dated December 14 and 20, 2014, of Petitioner snorkeling. Pet'r's Ex. 6 at 133, 136. There is another image, dated December 19, 2014, of Petitioner participating in a marathon with both arms extended in a pose that displays shoulder-level, flexed biceps. *Id.* at 133.

Petitioner also filed an undated photo of a workout stretch band; credit card transaction records for "Health and wellness" items from the CVS pharmacy, dated as early as December of 2017; credit card transaction records for Wegmans groceries items, dated from December of 2017; and a Costco receipt for Tylenol, dated April 18, 2019. Pet'r's Ex 7.

III. Summary of the Parties' Arguments

A. **Respondent's Motion to Dismiss**

Respondent filed his motion to dismiss on June 28, 2019. Resp't's Mot. to Dismiss. In his motion, Respondent argues that "[P]etitioner did not suffer the residual effects or complications of his claimed vaccine injury for more than six months[.]" *Id.* at 5. Specifically, Respondent does not agree that the medical documentation, the additional photographic and screenshot documentation, and the affidavits adequately support Petitioner's argument that he met his six-month requirement.[4] *See generally id.*

Respondent contends that Petitioner's medical records do not provide evidence of a SIRVA injury lasting more than three months. *Id.* at 6. Respondent notes the emails that Petitioner exchanged with Dr. Kim, beginning December 29, 2014. *Id.* Respondent acknowledges that in those emails, Petitioner complained of left shoulder pain that began post vaccination. Respondent then notes that on February 3, 2015, Dr. Tseng "diagnosed [P]etitioner with 'left shoulder muscle strain' but did not attribute this condition to the flu vaccine." *Id.* Following his diagnosis, "Petitioner sought no medical treatment for his injury." *Id.* Respondent concludes that "[g]enerously, these records only span a period of three months and are not sufficient to meet the six-month requirement." *Id.*

Respondent also argues that the subsequent medical visits do not support Petitioner's six-month requirement. *Id.* Respondent notes that Petitioner presented to dermatologist, Dr. Naftanel, on June 12, 2015, but "there was no mention of concerns about shoulder or arm pain." *Id.* Nearly two-years after the vaccination, in December of 2016, "[P]etitioner presented to Dr. Bock for an annual exam and reported that his left shoulder was bothering him"; however, Respondent states that "Dr. Bock specifically noted that his pain was related to doing pushups." *Id.* Respondent continues by stating that "upon exam [Dr. Bock] noted that [Petitioner] had a full range of motion ("ROM") to all joints, nontender, with normal strength with resistance in both extremities, and normal muscle tone." *Id.* at 7.

[4] Although the date of onset is also disputed in this case, the issue is whether the record establishes that Petitioner suffered residual effects or complications of his alleged injury for more than six-months. In this case, the date of onset does not affect whether the six-month duration of injury requirement would be satisfied.

Respondent summarizes by stating, "Petitioner therefore cannot rely on his visits to Dr. Naftanel or Dr. Bock to demonstrate that he was still suffering from the residual effects of his alleged SIRVA," because these "examinations contradict[] [P]etitioner's claim that he was still experiencing the lingering effects of his alleged SIRVA." *Id.* Respondent argues that "Petitioner has not filed any additional medical records . . . thus, nothing in the contemporaneous medical records support [P]etitioner's allegation that he suffered from the sequela of his alleged SIRVA for more than six months." *Id.* at 7.

Next, Respondent contends that the affidavits in support of the claim are not sufficient to prove Petitioner suffered an injury that persisted longer than six months. Respondent argues that "the Act makes clear that a Special Master may not find in favor of [P]etitioner 'based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.'" *Id.* at 8 (quoting 42 U.S.C. § 300aa-13(a)(1)). Respondent states that Petitioner's affidavits "generally allege that he has continually suffered the residual effects of his SIRVA injury for more than six months." *Id.* at 7. As for the affidavit submitted by Tim Goetz, Respondent states that "[a]lthough Mr. Goetz has impressive athletic certifications, he is not a medical doctor, nurse, or physician's assistant[;] [m]oreover, Mr. Goetz's affidavit states that he met [P]etitioner in December [of] 2016, nearly two years after [P]etitioner received the flu vaccine." *Id.* at 8. Respondent concedes that Mr. Goetz's affidavit is consistent with contemporaneous medical records in that Petitioner was experiencing pain while performing pushups. *Id.* However, Respondent argues that "Mr. Goetz [did] not provide independent evidence that [P]etitioner continued to suffer the residual effects of his SIRVA injury two years later." *Id.*

Finally, Respondent contends that the additional documentation filed by Petitioner is not sufficient to prove Petitioner's six-month injury requirement. Respondent argues that the photographs of the exercise band, the Costco receipt, and the Tylenol bottle are too recent to "independently demonstrate any connection to [P]etitioner's vaccination in December [of] 2014," because the photos were taken on April 18, 2019. *Id.* at 9. Additionally, Respondent states that the accompanying affidavit submitted by Petitioner "[did] not state when he bought the exercise band or whether any medical provider prescribed the band or the Tylenol specifically in relation to his alleged vaccine injury." *Id.* Respondent also argues that the screenshots of Petitioner's credit card statements showing purchases from CVS Pharmacy and Wegmans from 2017 through 2019 cannot be relied on because "the screenshots are not receipts and do not include any details setting forth the items purchased . . . and may capture routine grocery and pharmacy shopping throughout the past three years." *Id.* Respondent further elaborates that "[P]etitioner does not affirm that the medication he purchased from Wegmans or CVS is exclusively used for his shoulder pain and does not provide any information linking the use of the medication to an instruction by a medical healthcare provider specifically for pain relating to his vaccination"; therefore, "[the purchases] cannot independently support or refute [P]etitioner's claim." *Id.* at 10. Respondent summarizes, "[a]s a result, the Special Master must rely on [P]etitioner's word alone that he was 'not regularly using the exercise band or purchasing this level of OTC pain medicine on a regular basis until after [his] shoulder injury.'" *Id.* at 9.

B. Petitioner's Response

Petitioner filed his response on July 8, 2019. Pet'r's Resp. Petitioner argues that "his petition along with the supporting evidence [and] exhibits establish a claim for compensation, and that Respondent's motion does nothing more than disagree with the strength or credibility of Petitioner's evidence without satisfactorily explaining how the evidence in the record establishes Petitioner's symptoms did not last six months." *Id.* at 1. Additionally, Petitioner argues that a summary judgment standard should apply in review of this dismissal. *Id.* at 2.

Petitioner's main contention is that Respondent failed to explain how the evidence does not support "any finding that Petitioner suffered an injury that caused symptoms lasting six months or longer." *Id.* at 8. Petitioner argues that the lack of mentioning any shoulder or arm pain at the June 12, 2015 dermatologist visit should not affirmatively negate the existence of Petitioner's symptoms. *Id.* at 9. Petitioner explains that "[r]equiring reporting symptoms to providers such as these would be as relevant as requiring reporting to one's auto mechanic." *Id.*

As for Dr. Bock's record of Petitioner's pain concerning pushups, Petitioner argues that the pain is a symptom of the ongoing shoulder injury rather than the pushups being the cause of the shoulder pain. *Id.* at 10. Petitioner explains that the record of the visit with Dr. Bock states that Petitioner's pain started after doing pushups and does not state that the injury was related to doing pushups. *Id.* at 10–11. Petitioner continues that "[t]his is a critical distinction because one is a causation argument (injury related to pushups) versus the other being proof of ongoing symptoms past six months (pain at injury site related to activity that was not previously present)." *Id.* at 11. As for Dr. Bock's finding of normal ROM, Petitioner contends that "there is no indication that Dr. Bock had Petitioner perform pushups during the visit in the office. This would explain why her examination was normal at the time[.]" *Id.* Petitioner notes that "Dr. Bock found Petitioner's claims . . . significant enough to diagnose shoulder pain and weakness as an ongoing symptom and write a referral to an orthopedist for further evaluation." *Id.* at 12. Petitioner summarizes, "there is objective proof in the medical records of Petitioner continuing to report symptoms to medical providers over a year out." *Id.*

Additionally, Petitioner argues that his symptom duration is "supported by records from physicians and his trainer in addition to Petitioner's own statements." *Id.* at 13. Petitioner states that "[t]here is no requirement that Petitioner seek medical treatment from a physician to establish that symptoms persisted longer than six months, only that the claims of symptoms not be based solely on Petitioner's word alone." *Id.* Further, Petitioner contends that "[p]etitioners may pursue alternate methods of treatment without discounting the existence or duration of symptoms."

Finally, Petitioner asserts that when the record is taken as a whole, a duration of more than six-months of injury is revealed. *Id.* Petitioner argues that the submitted photographs and receipts "should be considered under a totality of the circumstances standard and go towards the weight and credibility of Petitioner's claims both in affidavits, to medical providers, and in other context regarding his ongoing symptoms." *Id.* As for the gaps in the timeline, Petitioner explains that he was not documenting every nuance of the case, because he was not preparing for litigation at that time. *Id.* at 14. Petitioner agrees that when "the documents are looked at in isolation and on an individual basis," they "do not meet Petitioner's burden of demonstrating six-months [of an ongoing injury]. *Id.* at 13.

Petitioner summarizes his response by stating that "Respondent seeks to require Petitioner to affirmatively establish six-months of symptoms by a preponderance of the evidence, which is premature at this stage of the proceedings." *Id.* at 15. Further, Petitioner states that "[t]here is no evidence supporting a finding that Respondent has affirmatively negated an essential element of Petitioner's claim." *Id.*

C. Respondent's Reply

Respondent filed his reply on July 15, 2019. Resp't's Reply. Respondent broadly reiterated his arguments from his motion but addressed the standard for which the motion should be decided.

Respondent contests Petitioner's claim that the summary judgment standard should apply by stating, "the summary judgment standard cannot be used to determine whether a party has established preponderant evidence, but only whether there is a genuine dispute of material fact." *Id.* at 2. Respondent argues that "[t]he six-month requirement is a mandatory prerequisite to any award of compensation and must be proven by preponderant evidence[,]" and that "the preponderance standard 'requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [she] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Id.* (citing *Moberly v. Sec'y of Health & Human Servs.*, 592 F.3d 1215,1322 n.2 (Fed. Cir. 2010)). Respondent contends that "[P]etitioner has not cited any authority explaining why the summary judgment standard should apply[.]" *Id.* Respondent notes that he "proposed filing a motion to dismiss on this issue both at the April 11, 2019[] status conference, as well as in [R]espondent's June 14, 2019[] status report. Petitioner did not object to the form of the motion, and the Special Master did not indicate that this issue should be adjudicated as a summary judgment motion." *Id.* at n.1.

Respondent argues that the affidavits and additional documentation did not show a six-month duration of Petitioner's SIRVA. *Id.* Respondent wrote that "[d]espite [P]etitioner's allegations to the contrary, the Vaccine Act makes it clear that a special master may not find in favor of [P]etitioner 'based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.'" *Id.* (quoting 42 U.S.C. § 300aa-13(a)(1)). As for the affidavit of Tim Goetz, Respondent argues that it cannot support Petitioner's argument, because "Mr. Goetz is not a medical doctor and, appropriately, does not independently speculate as to the cause of [P]etitioner's 2016 shoulder pain." *Id.* at 5. Respondent further asserts that Petitioner's second affidavit, which explained the photographs and screen shots, "[is] not sufficient to meet [P]etitioner's requirement in part because, as [P]etitioner concede[d], they are wholly dependent on [P]etitioner's word via his affidavit to explain what they mean." *Id.*

Respondent concludes by stating, "Petitioner has filed no further evidence other than that which he concedes cannot independently corroborate his claim and has given no indication why further proceedings would allow him to meet his burden." *Id.* at 6. Respondent further argues that "[t]he statutory six-month severity requirement is a threshold issue and may be addressed before reaching a decision on the other merits of the case because [P]etitioner's failure to fulfill this requirement is a bar to his claim." *Id.*

IV. Applicable Legal Standard

A. Six-Month Requirement

To receive compensation under the Vaccine Program, a petitioner must prove either (1) that he suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to his vaccination, or (2) that he suffered an injury that was actually caused by his vaccine.[5] *See* Sections 13(a)(1)(A) and 11(c)(1). Under either method, however, a petitioner must also show that the injured person has "suffered the residual effects or complications of his illness, disability, injury, or condition for more than six months after the administration of the vaccine." 42 U.S.C. § 300aa–11(c)(1)(D)(i). Cases may appropriately be dismissed for failure to substantiate the severity requirement. *See, e.g.*, *Hinnefeld v. Sec'y of Health & Human Servs.,* No. 11-328V, 2012 WL 1608839, at *4–5 (Fed. Cl. Spec. Mstr. Mar. 30, 2012) (dismissing case where medical history revealed that petitioner's Guillain–Barré Syndrome resolved less than two months after onset).

It is Petitioner's burden to prove his case (including the six-month requirement) by a preponderance of the evidence. *See* §300aa–13(a)(1)(A). To satisfy the six-month requirement, "[a] potential petitioner must do something more than merely submit a petition and an affidavit parroting the words of the statute." *Faup v. Sec'y of Health & Human Servs.,* No. 12-87V, 2015 WL 443802, at *3 (Fed. Cl. Spec. Mstr. Jan. 13, 2015) (quoting *Black v. Sec'y of Health & Human Servs.,* 33 Fed. Cl. 546, 550 (1995), *aff'd*, 93 F.3d 784, 792 (Fed. Cir. 1996)). A petitioner cannot establish the length or ongoing nature of an injury merely through his or her own statements, but rather is required to "submit supporting documentation which reasonably demonstrates that the alleged injury or its sequelae lasted more than six months . . . ." *Black*, 33 Fed. Cl. at 550 (internal quotations omitted); *see also Lett v. Sec'y of Health & Human Servs.*, 39 Fed. Cl. 259, 260-61 (1997) ("[s]ection 300–aa13(a)(1) provides that a special master may not award compensation 'based on the claims of petitioner alone, unsubstantiated by medical records or by medical opinion'").

B. Motion to Dismiss

In ruling on a Motion to Dismiss, special masters must draw every inference concerning disputed facts in favor of the nonmoving party. *See Warfle v. Sec'y of Health & Human Servs*., 05-1399V, 2007 WL 760508 at *2 (Fed. Cl. Spec. Mstr. Feb. 22, 2007); *Guilliams v. Sec'y of Health & Human Servs*., No. 11-716V, 2012 WL 1145003, at *9–10 (Fed. Cl. Spec. Mstr. Mar. 14, 2012); *Richard v. Sec'y of Health & Human Servs*., No. 02-877V, 2010 WL 2766742, at *4–5 (Fed. Cl. Spec. Mstr. May 3, 2010).

In *Warfle*, Respondent filed a Motion to Dismiss and argued "(1) that Petitioner failed to plead with substantiating documentary or testimonial evidence the statutory elements set forth in the Vaccine Act; and (2) that even if Petitioner had met the threshold requirements, the petition

[5] In this case, Petitioner initially asserted a Table injury as the basis for his claim. *See* Pet. at 1. Because I find that Petitioner fails to satisfy the six-month severity requirement, I do not reach the question of whether Petitioner has otherwise made a sufficient showing to prevail on either a Table or non-Table claim.

must be dismissed for lack of proof on the merits." *Warfle*, 2007 WL 760508, at *1. The Special Master concluded that in evaluating the motion, he need only assess whether the Petitioner could meet the Act's requirements and prevail, drawing all inferences from the available evidence in Petitioner's favor. *Id.* at 2. The Special Master found that on the basis of various documents submitted, a reasonable fact-finder could conceivably rule in Petitioner's favor, so Petitioner's case survived the dismissal motion. *Id.*

C. Summary Judgment Standard

As in *Warfle* and other motions to dismiss decided in this Program, the Vaccine rules allow for a special master to decide a case on summary judgment. *See Jay v. Sec'y of Health & Human Servs*., 998 F.2d 70, 82–83 (Fed. Cir. 1992); *see also* Vaccine rule 8(d) ("the special master may decide a case on the basis of written submissions without conducting an evidentiary hearing. Submissions may include a motion for summary judgment, in which event the procedures set forth in RCFC 56 will apply."). Congress specifically mandated that the Vaccine Rules "include the opportunity for summary judgment," to decide "[i]ssues of statutory interpretation and other matters of law[.]" § 12(d)(2)(C); *Santa Fe Pacific R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed.Cir.2002). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules . . . which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986) (citations omitted).

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a).[6] The United States Supreme Court has provided guidance on the summary judgment standard in *Anderson* and *Celotex Corp*. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986); *Celotex Corp.*, 477 U.S. at 322–23. A dispute is genuine if "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* The moving party "bears the [burden] of . . . demonstrat[ing] the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. In *Anderson,* the Court held that "[a] plaintiff may not defeat a defendant's properly supported motion for summary judgment . . . without offering any concrete evidence from which a reasonable jury could return a verdict in his favor and by merely asserting that the jury might [believe] the defendant's [own statements]." *Anderson*, 477 U.S. at 243; *see also Mingus Constructors*, *Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987) ("mere denials or conclusory statements [is] not sufficient" to demonstrate genuine disputes).

In *Celotex*, Respondent administratrix filed a wrongful death action in the Federal District Court, alleging that her husband's death resulted from his exposure to asbestos products manufactured and distributed by the defendants, who included Celotex. *Id.* at 319. Celotex filed

[6] Rule 56(a) states that "A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." RCFC 56(a).

a motion for summary judgment, asserting that, during discovery, Respondent failed to produce any evidence to support her allegation that the decedent had been exposed to Celotex's products. *Id.* In response, Respondent produced three documents tending to show exposure. *Id.* Celotex argued that the documents were inadmissible hearsay and could not be considered in opposition to the summary judgment motion. *Id.* The lower court granted the motion because there was no showing of exposure to Petitioner's products, but the ruling was reversed on appeal. *Id.* at 320–22. The Court of Appeals held that summary judgment in Petitioner's favor was precluded because of Petitioner's failure to support its motion with evidence tending to negate such exposure, as required by Federal Rule of Civil Procedure 56(e).[7] *Id.* at 322. That decision was appealed to the U.S. Supreme Court and reversed.

The Court held that the appellate court's finding was inconsistent with Rule 56(c). *Id.* The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* at 323. The moving party is "entitled to a judgment as a matter of law," because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.[8] *Id.* at 322–23.

V. Analysis

The parties dispute the standard that should be used to decide whether the statutory six-month injury requirement is met in this case. Respondent is correct that the durational requirement is a precedent condition that must be established prior to reaching injury causation. Respondent is also correct that petitioners must establish every element of their claim by a preponderance of the evidence. This requirement does not stand mutually exclusive to Petitioner's argument that at this stage in the proceedings, a genuine dispute of material fact may best be determined by trial. It can be true that there is no preponderant evidence that Petitioner sustained an injury for six

[7] Rule 56(e) states that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or (4) issue any other appropriate order." RCFC 56(e).

[8] The Court clarified, "[w]e do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses." *Celotex Corp.*, 477 U.S. at 326. During the discovery phase, the Court does not preclude the use of proffers or other representations of the existence of additional evidence that will be presented at trial to establish a fact. In the present case, however, Petitioner has made no representations that any additional evidence is forthcoming. *Celotex Corp.* affirms the point that "allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings" would make it "more difficult to grant such motions." *Id.* at 325-326. The Vaccine rules establish that the words of the Petitioner, whether expressed in said pleadings or supplemental affidavits, is insufficient to establish the essential elements of a claim. Therefore, evidence may be admissible, but without more, still insufficient to establish the existence of an essential case element.

months, and it can simultaneously be true that the evidence does not present a genuine dispute of whether the six-month injury requirement has been met. That does not have to be established in every case, but that is the case here.

Petitioner has presented an affidavit wherein he describes an immediate onset of shoulder pain following his flu vaccination. This contention is supported by contemporaneous emails sent to Petitioner's primary care physician in which Petitioner describes his pain and relates it back to his shot. Despite Dr. Kim's recommendation, Petitioner did not seek any immediate treatment from urgent care or schedule care with Dr. Kim. Indeed, pain notwithstanding, Petitioner provided photo evidence that he was able to participate in physically strenuous activities, including snorkeling and bicep flexing while running a marathon. Petitioner eventually sought treatment from Dr. Tseng and was diagnosed with a shoulder injury. Dr. Tseng noted Petitioner's concern about the vaccine but did not attribute Petitioner's injury to vaccination. More importantly, Petitioner was again referred for additional treatment for continued symptoms. Petitioner did not follow up on the referral, schedule a follow up with his primary care physician, or seek out alternative methods for relief.[9] Petitioner does not indicate that he was unable to obtain care due to an insurance lapse or provider unavailability. Taken together, these circumstances provide evidence that is not in dispute: Petitioner suffered some form of shoulder injury after his vaccination. However, Petitioner has provided evidence only that he suffered from a shoulder injury from sometime in December of 2014 through his visit with Dr. Tseng in February of 2015. Establishing this injury for three months is not enough. The six-month duration of the injury is at issue here.

There is no evidence in the record, aside from Petitioner's affidavits, that provide any support that he continually suffered from a shoulder injury from his diagnosis in February of 2015 through the time when Petitioner filed his claim. There are no medical records to indicate that Petitioner sought any sort of treatment until December of 2016. Notably, in that December record, Dr. Bock does not record any mention by Petitioner of continuing pain for the past two years. There is no record that the vaccination was mentioned as a possible cause. There is no history of previous treatment, and Petitioner's only request related to treatment was a prescription for a specific designer watch to track vital signs and fitness. This record provides no evidence of a continuing shoulder injury. This record does corroborate Mr. Goetz's statement that Petitioner was looking to improve his overall fitness and was frustrated by an inability to increase the number of pushups he could complete. Mr. Goetz wrote that Petitioner was interested in passing the FBI physical fitness test. There was no mention by Petitioner of the need for treatment for SIRVA or any other shoulder injury to the physical trainer tasked with developing a treatment regimen. Petitioner is correct that physician records are not the only type of evidence that can be submitted to provide evidence of a sustained injury. Indeed, if Petitioner had sought out Mr. Goetz for treatment for his shoulder at any point in 2015, instead of a request in December of 2016 to pass a fitness test, that evidence could be persuasive to establish that Petitioner's injury was ongoing. When considered with Dr. Bock's records, Mr. Goetz's affidavit provides evidence that is not in dispute, that Petitioner sought out treatment and training to address his inability to increase the number of pushups he was able to do. There is no preponderant evidence found in either of these

[9] Respondent argues that Petitioner's dermatology records provide relevant evidence that Petitioner was no longer suffering from his shoulder injury. However, I am inclined to agree with Petitioner that a failure to disclose shoulder pain to a dermatologist is logical, given that provider's inability to treat the problem.

submissions that Petitioner's desire to increase his overall fitness is related to a vaccine-related shoulder injury.

Finally, Petitioner's proof of medications and exercise equipment related to ongoing symptoms does not provide any evidence that Petitioner had been treating an ongoing shoulder injury since February of 2015. It is questionable that I issued the order for Petitioner to file a status report, indicating whether he intends to file any additional evidence on April 11, 2019, and yet Petitioner's receipt for Tylenol from Costco was dated April 19, 2019. Petitioner's purchase of a pain reliever after a request for outstanding evidence is not helpful. Petitioner's other transactions also take place well after the period of time where the duration of Petitioner's injury is not supported by the record. Consequently, these purchases shed no light on whether pain medication was needed or acquired during the relevant time period. It is also important to note Respondent's point that the descriptions of groceries or health and wellness items in Petitioner's transactional history are not sufficient to provide evidence of shoulder injury. It remains unclear why Petitioner provided an undated photo of workout equipment.

VI. Conclusion

The Act makes it clear that a special master may not find in favor of a petitioner "based on the claims of a petitioner alone". 42 U.S.C. § 300AA-13(a)(1). Thus, a special master must consider the evidence that can be used to establish each specific element of the claim and not just Petitioner's words in the summary judgment analysis. When the totality of the record is considered, Petitioner has provided preponderant evidence to corroborate his assertion that he suffered from a shoulder injury in December of 2014 that was diagnosed in February of 2015. Petitioner has also provided preponderant evidence to corroborate his assertion that in December of 2016, approximately two years later, he sought out treatment to improve his fitness generally and his pushup capability specifically. Indeed, there is no genuine dispute with regard to either of these facts. Petitioner has not, however, provided evidence, aside from the statements in his affidavits, that he suffered from continued shoulder pain during that two-year period. His own affidavits create the only contention in the record that Petitioner's injury continued from his diagnosis in February of 2015 through December of 2016. Petitioner's statements, without corroborative evidence, are insufficient to establish a fact as more likely than not or to create a genuine dispute of fact. Petitioner has not met the six-month injury requirement. Therefore, his claim must be dismissed.

IT IS SO ORDERED.

s/Herbrina D. Sanders
Herbrina D. Sanders
Special Master